IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN-N-OUT BURGERS,
a California corporation,

                                    Civil Action No.
            Plaintiff,   5:20-cv-11911

-vs-   Hon. Robert H. Cleland

DOLL N BURGERS LLC,   Magistrate Judge
DOLL N BURGERS TECUMSEH, LLC,   Anthony P. Patti
DOLL N BURGERS JACKSON, LLC
VERITAS VINEYARD, LLC
and JUSTIN DALENBERG,

            Defendants.
_____/

            DEPOSITION OF JEFFERY A. STEC, Ph.D.

taken by the Plaintiffs on the 29th day of June, 2021,

via Zoom, Chicago, Illinois, at 9:56 a.m.

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1   what you're saying?

2   Q.   I'm not following your response. So let me start over

3   with a different question.

4   A.   Okay.

5   Q.   Asking the question in a different way. Let's say I'm --

6   I'll try to make it as close to the reality as possible.

7   Let's say I am testing these treatment images of In-N-Out

8   Burger and I want to know whether or not these particular

9   images have secondary meaning in them. And as a control

10   image, I use a picture of the Golden Arches, exterior of

11   the McDonald's sign -- of the McDonald's building, has

12   the Golden Arches on it, it's got Ronald McDonald all

13   over it, everything you could possibly associate with

14   McDonald's.

15   Let's say close to 100 percent of the

16   respondents identify those images with McDonald's, and

17   thus, all of them answer one company for the control

18   images.

19   Now, in that situation, it really doesn't

20   matter what images I show of the treatment images. I get

21   a zero percent secondary meaning, but that doesn't

22   actually tell me anything about how many people have

23   secondary meaning in the In-N-Out trade dress, right?

24 A.   If you're saying that part of the hypothetical is that

25   the control percentage, in other words, the percentage of

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1   people/respondents that were shown that image, and I

2   believe you said it's the McDonald's images, would

3   associate it with McDonald's, one company, let's just say

4   one company, then that 100 percent would be netted

5   against whatever the percentage of people/respondents who

6   said one company from the treatment, the treatment could

7   be no more than 100 percent. So the net would be zero,

8   if not a negative number, if you were to do that type of

9   comparison.

10   Q.   Okay. All right. We're on the same page then.

11   So the result of that net zero though doesn't

12   tell me any useful information about the In-N-Out trade

13   dress because I haven't actually tested the In-N-Out

14   trade dress at that point, right.

15   A.   The way you've described the hypothetical, so I don't

16   know if In-N-Out would suggest that any of the McDonald's

17   trade dress and the images used in the control are part

18   of what's protected or asserted by In-N-Out, that I don't

19   know.

20   If you want to say the hypothetical -- in the

21   hypothetical that that's the case, In-N-Out wouldn't

22   assert any of its design elements against McDonald's,

23   then I can agree with you that there's no way then you

24   could test those design elements for In-N-Out by showing

25   McDonald's pieces of information.

1 Q.   Okay. So then you'd agree with me that separate from

2   this question of are we changing only the things in the

3   trade dress, you also don't want to introduce noise in

4   the control images by introducing secondary meaning that

5   is unrelated to the trade dress as well, right? That

6   would artificially deflate the net secondary meaning

7   number?

8 A.   So if you're asking whether you'd want to introduce in

9   the control images, design elements, whatever you want to

10   call them -- I'm sorry.

11 Q.   No, keep going.

12 A.   I heard feedback I thought someone else was talking.

13 Q.   No.

14 A.   So if you wanted to test the -- you wanted to create the

15   control and you wanted to make sure the control wouldn't

16   be associated with one source because of other design

17   elements, that would perhaps be associated with one

18   company, then you could potentially consider that in the

19   context of the control by removing those design elements.

20   So at the end of the day, to make it as

21   concrete as possible, one of the things I did in my

22   survey was to remove the palm trees, because I understand

23   that was something that was filed as a trademark by

24   In-N-Out, I believe it was a fairly long time ago, and so

25   by leaving that in the control, which doesn't appear

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1   one source, but they didn't know the name of it, they're

2   still going to answer this question no, right? Or don't

3   know, one of the two?

4 A.   So if they have an opinion about what company puts out

5   the products from this quick service restaurant, they

6   would presumably answer yes. So they would answer

7   Question 1 yes. And then if they answered yes, they

8   would be asked what company do you think puts out the

9   product. And type in whatever they want, or if they

10   didn't know, they would then enter that.

11 Q.   Let's say they're familiar with the dress, they've seen

12   it a hundred times, name's on the tip of their tongue,

13   just can't think about it, so they have to answer

14   "don't know," but they're intimately familiar with the

15   dress. They're still going to answer "don't know"?

16 A.   Well, if they're intimately familiar with the trade

17   dress, then it begs the question how they don't know the

18   name of the company. But if they -- if what you say is

19   what happens, so they're intimately aware of the trade

20   dress, but they can't think of the name of the company,

21   then presumably they would say "don't know."

22 Q.   That's ultimately going to count as somebody in your

23   survey for whom they're not confused, correct?

24 A.   This is going to be -- so let's, I guess, put this in the

25   proper context. First what they're going to see before

1   they get to these questions is the junior user's images

2   or stimuli. So you're paging through some of it now.

3   That stimuli is what they're going to see. So if they

4   think that's associated with somebody, but they can't

5   think of who it is, then they would say "don't know" to

6   Question 2. And because they don't know who it is, then

7   essentially they would be counted as somebody who isn't

8   confused.

9 Q. Who is not confused. You cut out at the end there. You

10   count it as what?

11 A. Somebody who was not confused.

12 Q. Now, you didn't alter the identifying information here in

13   this picture on page 34 that says "Doll N Burgers,"

14   correct?

15 A. That's correct. That was the way it appeared in the

16   original picture.

17 Q. Right.

18   And are you familiar, did you read through the

19   comments the number of people who said -- who identified

20   Doll N Burgers because they said that's what it said on

21   the building or that's what it said on the sign?

22 A. I did read the open-ended answers and I believe we

23   created a table farther down in the report that gives the

24   open-ended answers at least categorized.

25 Q. Well, as you categorized them, right?